LA QUADRATURE DU NET

Comments from *La Quadrature du Net* (Squaring the Net) on the *Green Paper on Copyright in the Knowledge Economy*

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These comments are submitted on behalf of La Quadrature du Net (Squaring the Net). La Quadrature du Net (http://laquadrature.net) is a citizen network providing information on policy initiatives, defending freedoms and rights of Internet users (including knowledge producers) and tabling constructive proposals for the development of a knowledge society and a thriving economy serving it. La Quadrature du Net has been an important contributor to the recent debates on telecommunication and copyright regulation and policy initiatives, at European level as well as at National level.

These comments have been drafted by Philippe Aigrain, Jérémie Zimmermann and Gérald Sédrati-Dinet. Details on the authors' background and credentials can be found at the end of this document. Correspondance regarding these comments should be addressed to Philippe Aigrain, paigrain@laquadrature.net .

We encourage publication of our comments by the European Commission. As a matter of transparency of policy preparation, we urge it to abandon the practice of accepting confidential comments in consultations on policy and to make clear in further consultations that comments whose publication is not authorized will be disregarded.

1. General comments on the Green Paper and our recommendations on *General issues*

We praise the European Commission for having opened a wide-ranging consultation on copyright in the knowledge economy. We particularly welcome the following aspects aspects of the Green paper :

- The recognition that the various facets of knowledge constitute one interdependent ensemble, where science, education, culture, public expression and innovation contribute together to a knowledge society.
- The openness demonstrated by the European Commission with regard to the possible creation of new exceptions, thus showing readiness to reconsider the exhaustive character of the list of possible exceptions in directive 2001/29/CE.
- The recognition that the creation of a new "making available to the public" exclusive right and more generally the stronger definition and enforcement for exclusive rights have not benefited authors at large.
- The mention that the list of questions are of an indicative nature and that comments can be formulated on other issues relevant to the scope of the Green Paper.

However, some elements in the Green paper indicate that the awareness of the drawbacks of the approach implemented in the past 10 years is still too limited. Sentences such as: *A high level of copyright protection is crucial for intellectual creation* or *A rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts and to encourage producers and publishers to invest in creative works* are of a purely declarative nature. What we mean by this is that these sentences risk to hide the most important question: Which system of copyright protection is likely to serve the aims of rewarding creators at large, of ensuring investment in a wide variety of creative works, and of enabling an empowering access to knowledge and culture? This is all the more surprising since the Green paper acknowledges that many categories of authors and performers do not think that the present system is effective from these view points. Furthermore, for science and research that constitute an important part of the scope of the Green paper, investment in producing creative works is not done by publishers of copyrighted works, who only invest in their dissemination and promotion.

We also point the European Commission to the fact that in the Internet era, the delineation of activities can not be defined by the nature of institutions conducting them. Education happens also outside of the limits of teaching organizations such as schools and universities. Even research related-activities need to made possible also outside of research organizations, in particular for the sake of creating a more productive interface between science and society. This has a bearing on our recommendations for research and education (see below).

I.1 General approach to exceptions and limitations

The approach to exceptions implemented in directive 2001/29/CE is a clear policy failure. The exhaustive character of the list of possible exceptions was at the time of its adoption intended to give legal certainty to IPR holders in order to facilitate the adoption of an increased set of exceptions favourable to access and usage of knowledge. This adoption has not happened in practice, or only to a very limited degree in some Member States. The exhaustive character of the list of exceptions is now standing as an absurd constraint, unjustified by the overall international legal framework. It risks to hinder the putting in place of alternative remuneration schemes based on collective licensing for the non-market exchange of creative works over the internet, at least in situations where legal licensing would be necessary to overcome the opposition of some entrenched and inefficient oligopolies. These schemes are today one of the key paths towards the creation of a sphere of free cultural exchanges and the development of a rich creative economy.

We provide below a number of recommendations that aim at re-opening the policy space so that the challenges of creating a knowledge society can be addressed. These recommendations are not limitative, and we also point the European Commission to the approach to Exceptions and Limitations proposed in the Draft Treaty on Access to Knowledge[1].

1 Draft treaty on Access to Knowledge, 9 May 2005, http://www.cptech.org/a2k/a2k_treaty_may9.pdf

Recommendation 1: Table a proposal to remove the exhaustive character of the list of exceptions in 2001/29/CE and make clear that new exceptions and limitations can be created as long as they respect the applicable international legal framework (three-step test when applicable, also taking in account other facilities that are open by the Bern Convention Appendix or article 40 of TRIPS, for instance).

Recommendation 2: Propose Member States for the European Union to adopt an open approach to the creation of an instrument of Limitations and Exceptions, going beyond the present work in WIPO on exceptions for the disabled by addressing also minimal research and education exceptions, for instance.

Recommendation 3: More generally, promote a reasonable interpretation of the three-step test (along the line of the declaration *A Balanced Interpretation of the Three-Step Test in Copyright Law*[2]) in the relevant international arenas (WIPO, WTO) and adopt it for the evolution of the European copyright framework.

Recommendation 4: Oppose the inclusion in trade agreements being negotiated such as ACTA (or other international agreements) of any provision that could directly or indirectly further limit the existing or possible exceptions, or otherwise restrict directly or indirectly the rights of users of knowledge in its widest sense.

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The *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*[3] has shown that the approach based on non-mandatory exceptions has failed in two respects: it has not led to harmonization, but in effect to counter-harmonization, and the possibility of implementing new exceptions to compensate for putting in place TPMs protected against circumvention has not been significantly used in most Member States.

Recommandation 5 in answer to questions 3, 4, 5: We encourage the European Commission to propose that for an additional set of exceptions to be made mandatory. This should be the case in particular for research and education, and for a right of quotation applicable to all media and whose extent is defined in relation to the purpose of the new expressive or creative work that makes use of quotation. We urge it to clarify that mandatory exceptions must be effective in the face of technical protection measures, that is a TPM that does not enable the full exercise of a mandatory exception can be legally circumvented for the purpose of exercising the exception.

I.2 Encouragement for an efficient overall contractual management of rights, enabling wide and effective user rights

Whereas (18) of 2001/29/CE, as well as the creation of new extended collective licenses in various countries, have confirmed their validity in European law. However, these schemes, as well as other forms of mechanisms for globally managing rights in a manner that does not create transaction costs or harm to freedoms have not been sufficiently considered in copyright-related policy proposals.

Recommendation 6 in answer to question 2: We call the European Commission to stress the potential of extended collective licenses for non-commercial peer-to-peer exchange between individuals of digital works on the Internet as a possible strategy for ensuring an effective remuneration and funding of creation in a manner that is compatible with the rights and freedoms

2 http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf

3 L. Guibault, G. Westkamp, T. Rieber-Mohn, P.B. Hugenholtz, (et al.), *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, report to the European Commission, DG Internal Market, February 2007, http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf

of all. We call the European Commission to encourage experimentation of such schemes that are growingly considered by collective management societies in Europe.

II Specific issues

II.1 Licensing with publishers cannot compensate for the absence of a needed exception

Licensing of copyrighted works for activities such as commercial publishing of course will always occur in research, educational or cultural organizations. However, examples in Member States, for instance France, have amply demonstrated that an approach based solely on licensing from publishers totally fails to create the needed environment for access to and use of knowledge resources in research, education, libraries, archives, and museums. On the contrary, it distorts competition by creating preferential access to some resources rather than to others. It enables publishers to gain control and sometimes access to confidential information on usage in educational or research organisations. Finally, it leads to unacceptable restrictions on the type of usage that is authorized, where it can take place, and which public can benefit from it. We advise the European Commission to abstain from further exploring this path (voluntary licensing from publishers). Where a true exception for research and education is in place, for instance in the Scandinavian countries, the results are visible in the output of education and research. When an exception is in place, such as for access by the disabled, voluntary agreements can be useful to install favourable technical conditions for an effective access by the disabled, including in the frame of creative and knowledge creation activities. However, schemes for such agreements must apply to all publishers, which is probably easier to attain through regulatory provisions (see next section).

Recommendation 7 in answer to questions 7, 13 and 19: Only when adequate exceptions for the access to and use of knowledge are in place can licensing agreements between publishers and knowledge organizations (caring for the needs of the general public or of specific groups such as the disabled) play a mutually beneficial role.

II.2 Mandatory provisions on access formats for the disabled should specify properties of formats and not specific formats

Recommendation 8 in answer to question 14: mandatory provisions on formats in which works are made accessible for the disabled are useful and even necessary in order to guarantee an effective access. However, these provisions, like any other provision regarding technology or formats, should not mandate usage of specific formats, but rather define properties of the usable formats. The needed properties are being open standards in the sense of the European Interoperability Framework developed by IDABC[4], availability of simply free / open source software solutions for accessing and processing the format, the fact that the format is adapted for access by the disabled, as well as for re-use.

II.3 Rather than trying to marginally repair the harm from the directive 96/9/EC on the legal protection of databases, the European Commission should propose for it to be repelled

The 96/9/EC constitutes the prototype of legislative failure. The study in its impact conducted for

4 http://ec.europa.eu/idabc/servlets/Doc?id=19529
A similar definition is included in article 4 of the french Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164

the European Commission has concluded that it had adverse impacts on access to knowledge and no documentable positive impact on the knowledge publishing industry as a whole. The directive principles are rejected even in countries that are generally favourable to the extension of IPR scope and enforcement. Despite these findings, the Commission has not seriously considered the only convincing option in such a situation which is to repel the directive. This has become a stand case for democracy: is the European Union able to correct one of its mistakes (any government or political institution is likely to make some)?

Recommendation 9 in answer to question 18: We urge the European Commission to face this problem without eye-blinds and to propose Member States to repel the directive. It would do a lot for the standing of the European Union as a supporter of knowledge societies.

II.4 Mandatory minimum rules for education and research

Recommendation 10 in answer to questions 22 and 23: We support a mandatory exception for research and education, where the definition of beneficiaries is focused on activities rather than on nature of institutions. However, it could be useful to clarify for instance that educational organizations are by nature beneficiaries of the exception for all their educational activities, provided this applies regardless of the targeted public (for instance it should also apply to open universities or courses open to the general public). We support for the mandatory exception to apply for both education and research as these activities are often inseparable, and even more as the case for a mandatory exception is equally convincing for both.

In contrast, we do not think that mandatory rules on the length of excerpts of works which can be reproduced or made available for teaching and research purposes are to be the preferred scheme. Whether a given use of works enters in the exception depends on the needs of the teaching activity (as we already pointed when discussing the right of quotation). The only case where a minimum length of extracts would be useful is when defining compulsory rules for any technical protection measure (meaning that a TPM would be illegal in case it does implement the ability to freely extract up to that length). However, this can turn to be harmful if such a rule is interpreted as defining a standard for normally authorized activities. It is for judiciary authorities and accumulating case law to judge if a given use respects the defined scope of the exception. The role of legislation is to provide a clear definition of this scope and to make sure that the exception can be exerted in practice.

II.5 User-created content

Let us first remark that all creative or knowledge works are “user-created content”. However, we understand that the European Commission has here in mind the generalisation of content production by individuals re-using some existing content, and also of the ability of these end-users to reach for the general public. This generalization is one of the most promising developments of the information and knowledge society.

Recommendation 11 in answer to questions 24 and 25: We support the introduction of rules defining or restating acts that users are authorized to accomplish when make use of copyrighted material in their productions, as well as their duties in this respect, provided:

- that these rules never limit the general rights of users such as the right of quotation for the sake of criticism, review or public political expression, and more generally any re-use right that contributes to freedom of expression

- that requirements on duties such as attribution do not introduce harmful technical or human complexity in their implementation. We encourage the European Commission to follow the good practice of Creative Commons licenses and of free re-use licenses in this respect.

We recommend that actions to foster legal certainty for user-generated content activities are

conducted with a primary focus on enabling users to conducting these activities. The decision on making or not a specific exception must first consider what can be achieved by way of general exceptions and other user rights.

About the drafters of these comments

Philippe Aigrain is one of the co-founders of La Quadrature du Net. He is the founder and CEO of Sopinspace, Society for Public Information spaces, a company developing free software and providing commercial services for the public debate and collaboration over the internet. He holds a doctorate and the *habilitation à diriger les recherches* in Computer Science. Dr. Aigrain has researched the application of IT to media such as photography, video and music. From 1996 to 2003, he joined the European Commission R&D funding programmes where he was head of sector “Software Technology and Society”. Dr. Aigrain is the author of 2 books: *Cause commune, l'information entre bien commun et propriété*, Fayard, 2005 (translated in Italian and Arabic) and *Internet & Création: comment reconnaître les échanges sur internet en finançant la création ?*, In Libro Veritas, 2008. He has authored more than 100 scientific and technical papers in fields ranging from computer science economics, sociology, or history of technology to the philosophy of intellectual rights. Dr. Aigrain stands on the Board of Directors of the Software Freedom Law Center (New-York, USA) and on the board of Trustees of the NEXA Centre on Internet and Society (Torino, Italy).

Gérald Sédrati-Dinet is an active member of La Quadrature du Net. He founded and was chair of the French branch of the Federation for a Free information Infrastructure (FFII). He is an active member of APRIL, one of the key free / open source software NGOs if France. He has created the “Political Memory” tool, a Web-based software to facilitate access by citizens to MEPs and the monitoring of their votes on issues of intellectual rights.

Jérémie Zimmermann is one of the co-founders of La Quadrature du Net. Independent consultant on FLOSS technologies and network ecology, Jeremie Zimmermann has been actively working on issues where technology and law interconnects: software patents, DRM protection, and various copyright mutations. He promotes presentations of those issues that make them understandable and accessible by the general public.